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No. 08-204

IN THE
SUPREME COURT OF THE UNITED STATES

DAWN V. MARTIN, ESQUIRE
Petitioner

v.

HOWARD UNIVERSITY,
HOWARD UNIVERSITY LAW SCHOOL
and
ALICE GRESHAM BULLOCK, ESQUIRE

Respondent.

ON PETITION FOR WRIT OF C*ERTIORARI*
TO THE UNITED STATES COURT
OF APPEALS FOR THE D.C. CIRCUIT

AMICUS BRIEF OF THE NATIONAL
ORGANIZATION FOR WOMEN (NOW),
ET AL., IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OUT OF TIME

Amici, The National Organization for Women (NOW), The National Association of Women Lawyers ("NAWL"), Peace at Work and additional *Amici* listed in the Appendix, file this motion for leave to file *Amicus Curiae* Brief out of time. While *amicus briefs* were due September 16, 2008, counsel for *Amici* became ill and temporarily unable to complete the Brief in time to circulate it to the various *Amici* for comment and revisions. Despite counsel's best efforts, given the work involved in preparing the brief, as well as commitments in counsel's regular practice, *amici* were unable to file until this date. The *amici* have the full support and consent of Petitioner's counsel, and do not believe that any prejudice will result to Respondent from this delay. The *amici* all share a common interest in protecting the rights of stalking victims, who are predominately women, and in ensuring that the employers of these victims fulfill their obligations to provide a safe, productive work environment that is free from threats of stalking and retaliation against stalking victims.

Through this brief, the *Amici* illustrate, within the bounds of applicable law, an employer's responsibility for the actions of those whose conduct creates a patently unsafe, hostile working environment resulting in both psychological and physical assaults of disastrous proportions. Absent such responsibility, stalking victims will have little to no recourse for such blatant retaliation for doing nothing more than "working while female" and being stalked.

Respectfully submitted,

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This Brief is filed in support of Petitioner, Dawn V. Martin, Esquire.

THE INTERESTS OF *AMICI CURIAE*

The National Organization for Women (NOW) [1]

The National Organization for Women (NOW) is the largest, most comprehensive feminist advocacy group in the United States. NOW's purpose is to take action to bring women into full participation in society — sharing equal rights, responsibilities and opportunities with men, while living free from discrimination. NOW has an interest in promoting safety of women in the workplace and in eliminating gender-based discrimination.

The National Association of Women Lawyers (NAWL)

The National Association of Women Lawyers (NAWL) is the oldest women's bar association in the United States. NAWL works to advance the rights of women and to end discrimination and violence against women. NAWL acts as *Amicus Curiae*, and advises legislators and policymakers. NAWL members serve as delegates and liaisons to national and international organizations in its pursuit of justice for women. NAWL has an interest in promoting safety of women in the workplace and in eliminating gender based discrimination.

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[1] As required by Rule 37.6 of this Court, counsel for *Amici* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *Amici*, their members, or their counsel, have made a monetary contribution to the preparation or submission of this brief. Petitioner Dawn Martin consents to the filing of this Brief. Respondents have not provided written consent to the filing of this Brief, but have not indicated that they oppose its filing.

Additional *Amici*: see Appendix.

INTRODUCTION

The record herein establishes the following facts:

1) Prof. Dawn Martin was stalked in her workplace, *Howard University Law School*, by Leonard Harrison, a delusional serial campus stalker, with a history of violence.

2) Harrison pursued Prof. Martin to be his "wife," based on his assertion that she bore professional and physical similarities to a *fictional* character in a book written by renowned Prof. Derrick Bell;

3) Prof. Martin reported Harrison's conduct to the law school administration, the D.C. Metropolitan Police Department and campus security, asking for protection on campus;

4) Law School Dean Bullock assured Prof. Martin in writing that she was discussing the matter with the Director of Campus security, but never did so; nor did she take any action to prevent Harrison from entering the law school premises;

5) Howard University failed to follow its own procedures for addressing stalking on campus, so that the stalker freely reached Prof. Martin's office;

6) Less than a month after Prof. Martin reported the harassment, Howard's administration decided not to renew her teaching contract;

7) Howard continued to reject Prof. Martin from any position, permanent or visiting, for the remaining six months of her tenure at Howard, although there were three vacant positions for which Prof. Martin was well qualified; and

8) Dean Bullock concealed vacancies from the

Appointments Committee, even when a member of that committee specifically asked whether there was any vacancy for which Prof. Martin could be considered.

On April 18, 2006, the jury found, as Prof. Martin alleged, that Harrison's actions *did* create a "hostile work environment" for her. The jury further concluded that Howard failed to take reasonable steps to end it. Despite these findings, Martin was denied recovery because the jury concluded that Harrison's harassment was not "*sexual*" in nature nor based on Prof. Martin's gender, so her complaints were not "protected activity" within the meaning of Title VII of the Civil Rights Act of 1964, *et seq*. So even if Howard retaliated against her for reporting the stalking, Prof. Martin was deprived of her cause of action.

Such a result leaves women in this jurisdiction with no clear remedy at law for harassment by a stalker in their workplaces nor for being terminated in retaliation for complaining about it.[3]

For this reason, this Brief concurs with Prof. Martin's argument that the dismissal of her retaliation claims requires restoration pursuant to *Burlington Northern v. White*, 548 U.S. 53 (2006), and that she is entitled to judgment on her sexual harassment and retaliation claims.

The arguments below detail the impact of a decision adverse to Prof. Martin on the broader issues of sexual harassment and retaliation confronting women in their workplaces and

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[3] Although Prof. Martin was stalked by a stranger, this Court's decision will also affect victims of domestic violence. Domestic violence does not necessarily stop at the front door, but often overflows into the workplace.

campuses.

SUMMARY OF ARGUMENT

Leonard Harrison's stalking of Prof. Martin constituted harassment based on sex/gender, thereby invoking Title VII. Title VII prohibits harassment based on sex or gender. *Oncale v. Sundowner Offshore Services,* 523 U.S. 75, 118 S. Ct. 998, 1001, 140 L.Ed. 2d 201 (1998).

Stalking has been recognized as a severe form of sexual harassment. *Turnbull v. Topeka State Hospital,* 255 F 3d 1238 (10th Cir. 2001). A supervisor's subjective determination that stalking is not sexual in nature or based on sex ignores the fundamental nature thereof. P. Mullen and M. Pathe, *Stalking,* 29 Crime 272 (2002).

Employers are obligated to understand their duties under Title VII. If a supervisor can simply claim that he or she did not realize that the conduct complained of constituted sexual harassment, it will be in the employers' interests *not* to educate its managers regarding conduct that constitutes sexual harassment so they can all claim "ignorance" when a woman files a sexual harassment charge.

A single act of accosting a man should not insulate a harasser (or the employer) from a claim that subsequent gender-specific harassing behavior toward a woman is in fact gender-based. DC ST §22-404(b). Nor does the serial stalker's lone confrontation with a man affect the sex-based nature of his stalking of Prof. Martin.

A harasser's use of gender-specific criteria to select the target of his stalking establishes that the harassment is "based on sex." By analogy to "sex-plus discrimination" cases, this kind of gender profiling violates Title VII. *Abraham v. Graphic Arts*

International Union, 212 U.S. App. D.C. 412, 660 F. 2d 811 (D.C. Cir 1981). The use of a gender- specific character to locate a victim is based on sex.

Sexual assault or express solicitation of sexual acts need not be shown to establish hostile environment sexual harassment. *Ellison v. Brady*, 924 F 2d 872, 880 (9th Cir. 1991).

Adverse action that affects future employment opportunities is actionable retaliation under *Burlington Northern v. White*, 126 S. Ct. 2405 (2006) and its progeny.

The clear public policy interest in preventing crime argues for a theory of protection for victims of workplace violence. *Franklin v. Monadnock Co.*, 151 Cal. App. 4th 252 (Cal.2007).

The imposition of Court costs on good faith claimants chills the pursuit of the objectives of Title VII. *Ledbetter v. Goodyear Tire & Rubber Co. Inc.*, 127 S. Ct. 2162 (2007).

ARGUMENT

I. Harrison's Stalking of Prof. Martin Constituted Harassment Based on Sex/Gender, Thereby Invoking Title VII

A. Stalking Has Been Recognized as a Severe Form of Sexual Harassment against Women

Courts have long recognized that stalking is one of the most egregious forms of sexual harassment. *Crowley v. L.L. Bean*, 303 F.3d 387, 396, 401-403 (D. Me. 2002) (plaintiff identified the harasser's conduct as "stalking" and had therefore met her burden of demonstrating that she perceived the harasser to have created a "hostile or abusive environment"); *Frazier v. Delco Electronics Corporation*, 263 F.3d 663, 668 (7th Cir. 2001)

(stalking recognized as creating a hostile work environment); *Whitmore v. O'Connor Management, Inc.*, 156 F3d 796, 798 (8th Cir. 1998) (sexual harassment was so severe that co-worker would "almost call it stalking"); *Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1108 (8th Cir. 1998) (plaintiff felt that her co-worker "was harassing her, actually, stalking her"); *Angeles-Sanchez v. Alvarado*, 1993 U.S. App. LEXUS 10509 (1st Cir. 1993) (sexual harassment/hostile work environment included "stalking"); *Spina v. Forest Preserve District of Cook County*, 207 F. Supp. 764, 772 (D. Ill. 2002) ("stalking" listed as one of the more severe allegations of sexual harassment); *Ramirez v. New York Presbyterian Hospital*, 129 F. Supp. 2d 676, 678 (S.D.N.Y. 2001) (plaintiff used "stalking" to describe acts of sexual harassment/hostile work environment); *Dolman v. Williamette University*, 2001 U.S. Dist. LEXIS 7772 (D. Or. 2001) (professor stalked by a former student was sexually harassed); *Chontos v. Rhea and Indiana University*, 29 F. Supp. 931, 937 (N. Dist. Ind. 1998)[3] ("stalking" was one of the most "disturbing" acts of sexual harassment).

B. A Serial Stalker's Lone Confrontation with a Man Does Not Affect the Sex-Based Element of His Stalking of Women

Judge Hogan's October 4, 2006 decision justified the jury's finding that the stalking was not gender-based by referring to Harrison's single confrontation seven years earlier with a renowned African-American male professor, Prof. Derrick Bell, at Harvard University Law School. (*See* 2006 WL 2850656 at

[3] This lawsuit was filed against University under Title IX, rather than Title VII of the Civil Rights Act of 1964.

*4, (Pet. A-146). However, neither Howard's administrators nor Prof. Martin even knew that Harrison confronted Derrick Bell until 1999 – a year after Prof. Martin left Howard.

Harrison's one-time confrontation of Prof. Bell in 1990, therefore, should not serve as evidence that Howard's officials believed that Harrison was an equal threat to men and women, or an "equal opportunity harasser." Harrison was not an ongoing threat to Bell. Harrison only confronted Prof. Bell as a means of locating his next *female* stalking victim. Significantly, Harrison's confrontation of Prof. Bell cannot be considered stalking by any definition, as a pattern of behavior is a necessary requirement of stalking.[4]

In 1997-1998, when Prof. Martin was complaining of Harrison's stalking, neither Howard nor Prof. Martin had any reason to believe that Harrison had harassed any man, at any time. In fact, Harrison's letters expressly identified numerous women that he had targeted, over a period of years, to be his "wife." It is not possible, then, that Howard could have perceived Harrison as an "equal opportunity harasser" at the time Prof. Martin requested protection from him. To argue that one who commits ongoing acts of female gender based harassment would never commit an aggressive act against a man is as ludicrous as it is irrelevant.

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[4] DC ST § 22-404 (b) states that "Any person who on more than one occasion engages in conduct with the intent to cause emotional distress to another person or places another person in reasonable fear of death or bodily injury by willfully, maliciously, and repeatedly following or harassing that person, or who, without a legal purpose, willfully, maliciously, and repeatedly follows or harasses another person, is guilty of the crime of stalking."

Harrison's confrontation with Bell was not a gender-based act against Bell although his purpose was gender-based: to locate a woman to be Harrison's "wife" based upon Bell's fictional character of Geneva Crenshaw.

Under the rationale set forth by the district court, an employer can invalidate a woman's Title VII protections by producing evidence that the sexual harasser demonstrated violent or threatening behavior toward any male, at any time in his life. The broad implications of this new legal edict could seriously thwart future sexual harassment claims. For example, one could argue that, since John Hinkley shot at President Ronald Reagan – a male -- on March 31, 1981, his stalking of actress Jodie Foster while she was an undergraduate student at Yale University was not based on sex, although he professed his "love" for her in letters and phone calls – as did Harrison in letters and phone calls to Prof. Martin.

A sexual harasser may have exhibited violent or other threatening behavior at some point in his life. This prior act neither diminishes nor negates sex-based harassment, such as stalking.

C. Title VII Protection Should Not Depend Upon the Employer's Subjective Belief of What Conduct Constitutes Sexual Harassment

In 1999, Judge Hogan concluded:

> In this case, it is clear that Plaintiff was only the object of Mr. Harrison's attention because she was a female. Therefore, the alleged stalking activities do appear to

> have been "because of sex" even if they were not inherently sexual in nature.

Martin, 1999 U.S. Dist. LEXIS 19516 at *11. (Pet. A-27)

On October 4, 2006, however, Judge Hogan held that he had not concluded, in 1999, that Harrison's harassment was "sexual in nature" or "based on sex."

> [T]his Court never found that Mr. Harrison's conduct was sexual in nature or because of Plaintiff's gender, but left this as a question for the jury. The jury verdict did not, therefore, contradict the Court's 1999 decision.

Martin, 2006 WL 2850656 at *3 (D.D.C.). (Pet. A-146)[5]

The only evidence before the jury indicating that Harrison's conduct was not sexual in nature was the testimony of Dean Alice Gresham Bullock stating that she did not perceive Harrison's conduct to be based on sex or sexual in nature.[6] Employers should not be permitted to escape liability for Title VII retaliation by claiming "ignorance of the law" – which would not even be a valid excuse in criminal proceedings.

The district court's 2006 decision and the jury's verdict make it possible for an employer to

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[5] Prof. Martin's Petition characterizes the District Court's submission of whether Harrison's harassment was based on sex to the jury as violating "the law of the case."

[6] *But see* Ms. Martin's Petition, explaining that, in a Memo to Howard's General Counsel, Dean Bullock stated to the contrary.

escape Title VII liability simply by stating that the employer's officials did not understand that the reported conduct constituted sexual harassment.

Employers cannot ignore stalking harassment of women as a gender based activity by simply disregarding the fundamental nature of stalking as a tool to control women. While stalking can affect men, the vast majority of stalking victims are female.[7] At least eighty percent of stalking victims are female.[8] Ninety-four percent of the female stalking victims identified their stalkers as being male.[9]

Employers are obligated to understand their duties under Title VII. If a supervisor can simply claim that he or she did not realize that the conduct complained of constituted sexual harassment, it will be in the employers' interest *not* to educate its managers regarding conduct that constitutes sexual harassment so they can all claim "ignorance" when a woman files a sexual harassment charge. Whether or not a woman is protected from termination by Title VII must not depend upon the purported level of knowledge of any particular supervisor.

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[7] P. Tjaden and N. Thoennes, *Research in Brief*, National Institute of Justice Centers for Disease Control and Prevention, (April 1998)

[8] *Id.*

[9] *Id.*

D. Where Gender Specific Language is Used to Identify and Target the Harassment Victim(s), the Harassment is "Based on Sex"

Where a harasser targets a woman because he fantasizes that she is related to him in sex-specific terms, such as "wife," "mother," "sister," "aunt," "grandmother," the target can only be a woman. The very words used by Harrison clearly identified his victims in terms that required them to be female.

The jury recognized this, but were clearly confused by the jury verdict form question 1c, which asked the jurors whether Harrison's conduct was sexual in nature or because of plaintiff's gender. The jury sent out a question:

"Wives are typically female. Is 1c an automatic 'yes' just because plaintiff is female." The court's reply was "No, it is not an automatic 'yes.' You must base your decision on the evidence presented to you." Thus it appears that the jury was led to believe that Harrison's pursuit of Prof. Martin as his "wife" was insufficient standing alone to establish the gender-based nature of the stalking, and that they needed additional proof of that element. Indeed this was the only element on which the jury did not find for Prof. Martin.

From the evidence, Harrison's harassment was clearly based on sex. The contrary finding by the jury, which disregards critical evidence, deprived the plaintiff of a remedy, and also offends the struggle of women to be safe in the workplace.

E. "Gender Profiling" as a "Sex-Plus" Factor in Sex Discrimination

Amici urge the adoption of a "gender profiling" analysis as part of employment law. "Gender

profiling" is closely related to the long recognized doctrine of "sex plus" employment discrimination.

Prior to *Martin*, Judge Hogan had recognized that "sex-plus" basis discrimination violates Title VII:

> Disparate treatment of subclasses of women, based on an immutable characteristic or the exercise of a fundamental right, has been held unlawful under Title VII; e.g. *Abraham v. Graphic Arts International Union*, 212 U.S. App. D.C. 412, 660 F.2d 811 (D.C. Cir. 1981) (leave policy did not accommodate pregnancy and hence was unlawful gender discrimination under Title VII). *Judge v. Marsh*, 649 F. Supp. 770, 779-780 (D.D.C. 1980).

In a "sex-plus" case, an employer does not discriminate against a protected class as a whole; rather it treats a subclass within a protected class disparately. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (employer treated women with children of preschool age differently than men in similar circumstances); *Sprogis v. United Air Lines*, 444 F.2d 1194 (7th Cir. 1971) *cert.* denied, 404 U.S. 991 (sex plus marriage violated Title VII, where airline hired married male flight attendants but not married female flight attendants).

Most sexual harassers have personal preferences and do not harass every woman they meet. In this case, Leonard Harrison targeted women based on their profession – particularly female academics addressing civil rights issues. Harrison did not similarly pursue male civil rights professors to be his "wife."

F. Where a Gender Specific Character is Used to Identify the Harassment Victim, the Harassment Constitutes "Gender Profiling"

Only a woman could be "Geneva Crenshaw." Where the harasser selects the victim based on his obsession with a female character, real or imagined, the harasser has selected the victim based on the basis of her gender. Although the harasser may need to see additional qualities in particular women in order for him to cast her in the role he has chosen for her, one constant requirement for the role is that she be female. The harassment is, therefore, necessarily based on sex and invokes Title VII.[10]

G. A Sexual Harassment Claim Does Not Require that the Harasser Sexually Assault the Victim or Expresaly Solicit Sexual Acts

Judge Hogan offered a rationale for the jury's failure to conclude Harrison's harassment was based on gender:

> The jury did not hear or see evidence that Mr. Harrison's conduct involved conduct typical of sexual harassment such as groping, touching or making sexual advances.

Martin v. Howard University, 2006 WL 2850656 at *4 (Pet. A-146)

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[10] As discussed in the Martin Petition, harassment based on "character profiling" could just as easily be based on racial profiling, or on the basis of national origin, color, religion, age or disability.

Amici contend that the enunciation of such a standard ignores the increased understanding of sexual harassment, and the gains made by working women during the past several decades. As established herein, stalking is a form of sexual harassment, and a plaintiff is not required to prove that she was "touched," "groped," or sexually assaulted to establish a sexual harassment claim.

Even intended compliments can constitute sexual harassment—a fact that Judge Hogan explicitly acknowledged in his 1999 decision. *See, Martin*, 1999 LEXIS 19516 at *12-13. (Pet. A-29) *Accord, Ellison v. Brady*, 924 F. 2d 872, 880 (9th Cir. 1991), wherein a male subordinate wrote love letters strikingly similar to those Harrison wrote to Prof. Martin and the Court held that the fear of receiving a "bizarre note from...a person she barely knew...," and "not knowing what this mentally unstable person would do next," was enough to create a hostile work environment for the plaintiff.

See also, Fuller v. City of Oakland, 473 F.3d 1523 (9th Cir. 1995), wherein a female police officer trainee was harassed by her ex-boyfriend, a more senior police officer. The sexual harasser did not touch plaintiff or threaten her; nor did he say anything to her that was overtly sexual; however, the context of the conduct and the history of the relationship indicated that the harasser wanted the plaintiff to be his girlfriend again. The court therefore defined the conduct as sexual harassment.

If harassment is "sexual in nature" where the harasser wants the victim to be his "girlfriend," then it must also be sexual in nature in the instant case, where the harasser takes it a step further, targeting the victim to be his "wife."

H. Pursuant to the Disparate Impact Theory, Stalking Constitutes Harassment on the Basis of Sex

Even when conduct might affect both men and women, the conduct may constitute harassment on the basis of sex if it disproportionately affects women. *Turnbull*, 255 F.3d at 1244; *see also Crist v. Focus Homes*, 122 F.3d 1107, 1111 (8th Cir. 1997).

Statistics compiled by the U.S. Department of Justice reflect that women are disproportionately affected by workplace violence, such as sexual assault and stalking. *See* Bureau of Justice Statistics, *National Crime Victimization Survey, Violence in the Workplace*, 1993-1999 (December 2001), at www.ojp.usdoj.gov/bjs/pub/pdf/vw99.pdf.

Not only are at least Eighty (80%) percent of stalking victims female[11] (*Id*, Tjaden and Thoennes) but, according to the U.S. Department of Justice, 1 in 12 females versus 1 in 45 males will be stalked. .

Where a woman is stalked in her workplace, the disparate impact analysis should be used in determining if the harassment is based on sex.

II. The Dismissal of Prof. Martin's Retaliation Claims Violates *Burlington Northern v. White*

Prof. Martin alleged that her employer failed to renew her teaching contract and cancelled, withdrew and/or concealed several vacant and

[11] Some of the targeted men are actually the boyfriends of women who are the real focus of the stalker; thus, the stalking of the man is simply part and parcel of the stalker's harassment of the woman. Even where a woman stalks a man, the stalking is generally "sexual in nature" or based on her desire to have or continue a sexual or romantic relationship with him. Thus, nearly all stalking is either "sexual in nature" or based on sex.

advertised faculty positions in order to remove her from the faculty because she asked for reasonable steps to be taken to stop a delusional stalker from pursuing her, in her workplace. In 1999, Judge Hogan refused to dismiss these retaliation claims,[12] but on October 20, 2003, Magistrate Judge Facciola dismissed them, holding:

> Title VII applies only to ultimate employment decisions such as hiring or discharging....

Martin, 2003 U.S. Dist. LEXIS 18501 at *31-32 (D.D.C. 2003) (Pet. A-31).

In June of 2006, this high Court decided *Burlington Northern v. White*, 126 S. Ct. 2405 (2006). *Burlington* expressly rejected the analysis set forth by MJ Facciola, who limited actionable retaliation to "ultimate employment decisions." 548 U.S. 53 (2006). Instead, the Court held:

> ...the proper formulation requires a retaliation plaintiff to show that the challenged action "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"

548 U.S. at 64.

Even before *Burlington*, the D.C. Circuit decided a stream of cases elucidating the definition of "adverse action" within the meaning of Title VII. *Holcomb v. Powell*, 433 F.3d 889, 902 (D.C. Cir. 2006) held that adverse actions included acts that

[12] 1999 U.S. Dist. LEXIS 19516.

affected future employment opportunities. *Rochon v. Gonzales*, 438 F.3d 1211 (D.C. Cir. 2006), held that Title VII makes unlawful any act of retaliation by an employer that might dissuade a reasonable employee from making or supporting a charge of discrimination pursuant to Title VII – whether it is related to current employment opportunities, future employment opportunities, or even potentially adverse consequences completely unrelated to employment. *Burlington* expressly adopted the standard for proving actionable retaliation set forth in *Rochon*. 26 S. Ct. at 2411, 2413, 2415.

Chappelle-Johnson v. Powell, 440 F.3d 484 (D.C. Cir. 2006), held that it is not necessary that the plaintiff "show that the position remained open and that the employer continued to seek applicants." It was enough that the plaintiff alleged that the employer "denied her an opportunity for advancement." *Mastro v. Potomac Electric Power Company*, 447 F.3d 843, 855 (D.C. Cir. 2006), held that the failure to permanently fill a vacancy could violate Title VII if the position was eliminated for discriminatory reasons. This Court's decisions were consistent with *Terry v. Gallegos*, 926 F. Supp. 679, 710 (W.D. Tenn. 1996), holding that a vacancy cancellation constituted actionable retaliation under Title VII.[13]

In Bowie v. Ashcroft, 283 F. Supp, 2d 25 (D.D.C. 2003), the same magistrate who dismissed Ms. Martin's claims only a month later actually cited *Terry* with approval, holding that:

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[13] *Accord, Ruggieri v. Merit Systems Protection Board*, 455 F.3d 1323 (Fed. Cir. 2006) ("Whistleblower Act" retaliation claim upheld where employer cancelled a vacancy in order to prevent the plaintiff from being promoted into it).

> no particular type of personnel action [is] automatically excluded from serving as the basis of a cause of action under [Title VII]."

In *Mintz v. District of Columbia, 2006 U.S. Dist. LEXIS 34446 at *12-13* (D.D. C. 2006) the same court, *via* a different judge, upheld a plaintiff's Title VII retaliation claim where he alleged that his employer failed to convert his temporary status to a permanent employee status, in retaliation for his support of the original plaintiff. The district court decisions in *Mintz* and *Martin* are inconsistent, and will therefore cause confusion within the D.C. Circuit if not reconciled.

Mintz is consistent with all other circuit and district court decisions that have considered whether a non-renewal is actionable under Title VII. *Walker v. Board of Regents of University of Wisconsin System*, 300 F. Supp. 2d 836, 853 (W.D Wis. 2004), a case, like *Martin*, against a University with employees holding temporary and/or renewable contracts, held:

> Whether this action is considered a termination or a refusal to re-hire, I conclude that it is a cognizable injury for the purpose of § 1981, § 1983 and Title VII. Being denied a renewed contract is not a "minor or trivial" action. *Silk v. City of Chicago*, 194 F.3d 788, 800 (7th Cir.1999).[14]

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[14] *Walker* relied on the unanimous consensus of other jurisdictions on this issue, including *Carter v. University of Toledo*, 349 F.3d 269 (6th Cir.2003); *Fekade v. Lincoln University*, 167 F.Supp.2d 731, 739 (E.D.Pa.2001); *Lindblom*

If this high Court does not correct the errors of the D.C. Circuit court in this case, *Burlington* and even the D.C. Circuit's own pre-*Burlington* definition of actionable retaliation, will be substantially eviscerated.

III. The Tort of "Wrongful Discharge" Should Be Applied Where Employees Are Fired for Reporting Stalking and Other Violent Crimes

Amici expressly adopt Ms. Martin's argument in her Petition, at 36, relying on recent developments in the law of wrongful discharge. In *Franklin v. Monadnock Co.*, 151 Cal.App.4th 252 (Cal. 2007), the plaintiff alleged that he was fired for telling his employer and police that a co-worker who assaulted him threatened to have him and others killed. The Court found that the state's public policy interest in preventing crime, as well as violence in the workplace, created a wrongful discharge claim.

Franklin provides encouraging precedent for relief for stalking victims, in their workplaces and on campuses, in cases that do not meet the Title VII or Title IX[15] definitions of sex discrimination. Amici

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v. Challenger Day Program, Ltd., 37 F.Supp.2d 1109, 1116 (N.D.Ill.1999); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Trejo v. Shoben*, 319 F.3d 878 (7th Cir.2003); *Griffin v. Board of Regents of Regency Universities*, 795 F.2d 1281 (7th Cir.1986). *Minshall v. McGraw Hill Broadcasting, Inc.*, 323 F.3d 1273, 1280 (10th Cir.2003) (ADEA); *Day v. South Park Independent School District*, 768 F.2d 696 (5th Cir.1985) (§ 1983); *Guinan v. Roman Catholic Archdiocese of Indianapolis*, 50 F.Supp.2d 845, 851 (S.D.Ind.1999) (ADEA).

[15] Title IX of the Civil Rights Act of 1964 prohibits sex discrimination in education, paralleling Title VII, which prevents discrimination on the basis of sex, race, national origin and religion in employment.

urge the court to apply the *Franklin* rationale to the case at bar to provide an alternative theory of protection for victims of workplace and campus violence, violating both the ADEA and Title VII.

IV. Taxing Defendants' Costs to Appellant Will Have a Chilling Effect on Title VII Plaintiffs.

Amici urge this Court to reverse the district court's taxation of Howard University's costs to Prof. Martin. *NOW* has campaigned against the imposition of costs on good-faith civil rights plaintiffs[18] for the same reasons that costs should not be imposed upon Ms. Martin.

A woman who acts as a "private attorney general," in good faith, to eliminate sexual harassment in the workplace, should not be forced to pay the unpredictable litigation costs of a wealthy defendant simply because the court did not adopt her reasonable and well-grounded legal arguments.

This Court and others have said that trial judges must exercise restraint in assessing whether costs should be assessed against a non-prevailing party in "public law litigation" cases such as Title VII of the Civil Rights Act of 1964. *Crawford Fitting Co. v. Gibbons*, 482 U.S. 437 (1987); *Baez v. the United States*, 684 F.2d 999, 1003-1004, 1007 (D.C. Cir. 1982); *Pannonia Farms v. RE/Max International, Inc*, 2005 WL 3262902 at * 3 (D.D.C. 2005); *Summit v. Technology, Inc.* 435 F.3d 1371, 1374 (Fed. Cir. 2006); *Dual v. Cleland*, 79 F.R.D. 696, 697 (D.D.C. 1978). These courts were unwilling to "chill" the pursuit of the objectives of Title VII by

[18] NOW responded to the Eleventh Circuit's imposition of costs on plaintiff Lilly Ledbetter, after she lost her case on the merits before this high Court. *See Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007).

individuals who believed they were injured by illegal discrimination.

NOW and its sister *Amici* now urge this high Court to expressly adopt the *criteria* offered by other jurisdictions to prevent the unjust result imposed on Ms. Martin by the district court. In *County of Suffolk v. Secretary*, 76 F.R.D. 469 (E.D.N.Y. 1977), the court set forth factors to be considered in determining whether costs should be assessed against plaintiff in public law litigation:

1) whether the action was brought and carried forward in good faith; 2) whether the prosecution of the action provided direct benefits to the public; 3) whether the action resulted in direct or indirect benefit to the defendant; 4) whether novel and substantial issues of law or fact were resolved; 5) whether costs were required to reimburse needy defendants; 6) whether costs would unduly burden non-affluent plaintiffs; and 7) whether the imposition of costs would unduly inhibit future similar challenges.

The jury's factual findings in Prof. Martin's favor demonstrate her good faith in instituting and maintaining this lawsuit. The *Amici*'s participation further demonstrates that the issues she raised in this case are important issues of public policy. The district court's decision to impose Howard's costs on Prof. Martin sets precedent that unfairly burdens Title VII plaintiffs and chills the exercise of civil rights protections, and should be reversed.

CONCLUSION

Amici Curiae respectfully join Ms. Martin's Petition for Certiorari.

Respectfully Submitted,

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APPENDIX

Additional *Amici*

1) Peace at Work
P.O. Box. 41214
Raleigh, NC 27629

2) The Arizona Coalition against Domestic Violence
301 E. Bethany Home Road, Ste. C194
Phoenix, AZ 85012

3) Iowa Coalition against Domestic Violence
515 28th Street
Des Moines, IA 50312

4) Survivors in Action
P.O. Box 4584
El Dorado Hills, CA 95762

5) The Weaker Vessel
P.O. Box 2603
Gary, Indiana 46403

6) After the Trauma, Inc.
P.O. Box 1533
Clinton, MD 20735

7) California Protective Parents' Association
P.O. Box 15284
Sacramento, CA 95851